No. 97-0465 (2)

FILED
OCT 17 1997
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

ALTA BATES CORPORATION,
ALTA BATES MEDICAL CENTER, AND
PATHOLOGY INSTITUTE, INC.,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
AND
OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29, AFL-CIO,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CALIFORNIA HEALTHCARE ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF PETITIONERS ALTA BATES CORPORATION, ALTA BATES MEDICAL CENTER, AND PATHOLOGY INSTITUTE, INC.

RICHARD J. SIMMONS
(Counsel of Record)
DOUGLAS R. HART
MICHAEL G. MORGAN
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
333 South Hope Street, 48th Floor
Los Angeles, California 90071
(213) 620-1780
Attorneys for California Healthcare Association

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

17 pp

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Introduction	3
II. The Growth of Affiliated Hospital Groups	4
III. The Ninth Circuit's Decision Will Have a Devastating Impact on Affiliated Hospital Groups.	6
A. The Ninth Circuit's Decision Eviscerates the Statutory Protections Against Secondary Boycotts and, Contrary to Clear Congressional Intent, Promotes the Spread of Labor Disputes Among and Between Affiliated Hospitals.	6
B. The Ninth Circuit's Decision Creates Uncertainty About the Scope and Application of Collective Bargaining Agreements Among Affiliated Hospitals.	8
C. The Ninth Circuit's Decision Potentially Makes Affiliated Hospitals Liable for the Discrimination and Wage and Hour Claims Against Their Distant Affiliates.	9
CONCLUSION	12

TABLE OF AUTHORITIES

Page

Cases

Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) 9

Alta Bates Corp. v. NLRB, 1997 WL 303259 1997 (9th Cir. June 4, 1997) 3

Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1997) 10

Brower-Coad v. Fundamental Brokers, Inc., 856 F. Supp. 147 (1993) 10

Cruz v. Central States Joint Bd. Health and Welfare Trust Fund, 1993 WL 259444 (N.D. Ill. 1993) 10

Field v. Corp. Office Systems, Inc., 1995 WL 399540 (N.D. Ill. 1995) 10, 11

Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) 10

Hishon v. King & Spaulding, 467 U.S. 69 (1984) 10

Lans v. Kiska Constr. Corp., 1997 WL 313162 (S.D.N.Y. 1997) 10

Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) 10

Lorrance v. AT&T Tech. Inc., 490 U.S. 900 (1989) 10

NLRB v. St. Francis Hosp. of Linwood, 601 F.2d 404 (9th Cir. 1979) 7

Radio Union v. Broadcast Service, 380 U.S. 255 (1965) 3

Schiele v. Charles Vogel Mfg. Co., Inc., 787 F. Supp. 1541 (D. Minn 1992) 10

Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981) 3

TABLE OF AUTHORITIES

	Page
Cases	
Van Norman v. Harman Mgmt. Corp., 1995 WL 803508 (N.D. Cal. 1995)	11
Statutes	
Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq.*	9
Americans with Disabilities Act of 1990, 29 U.S.C. §§ 12101, *et seq.*	9
Cal. Bus. & Prof. Code §§ 2400, *et seq.*	5
Civil Rights Act of 1991, 42 U.S.C. §§ 2000e, *et seq.*	9
Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.*	9
Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, *et seq.*	9
National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*	3, 6, 7
Pub. L. No. 93-360, 88 Stat. 395 (1974)	7
Supreme Court Rule 37.6	2
Other Authorities	
U.S. Code Cong. & Adm. News (1974)	7, 8
N.L.R.B. General Counsel Guidelines: Health Care Institutions, 4 Lab. L.Rep. (CCH) ¶9046 at 15,096-98 (1978)	8
Mark A. Hall, *Managed Competition and Integrated Health Care Delivery Systems*, 29 WAKE FOREST L. REV. 1 (1994)	5

TABLE OF AUTHORITIES

Page

Other Authorities

Williams M. Stelwagon, *Does a Healthy Patient Need a Cure?* 69 ST. JOHN'S L.REV. 553 (1995) 4

Thomas M. Susman & David A. Martland, *The Brave New World of Health Care: Hospital Mergers and Joint Ventures in the '90s* 38 BOSTON B.J. 3 (1994) 5

No. 97-0465

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

ALTA BATES CORPORATION,
ALTA BATES MEDICAL CENTER, AND
PATHOLOGY INSTITUTE, INC.,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
AND
OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 29, AFL-CIO,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CALIFORNIA HEALTHCARE ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF PETITIONERS ALTA BATES CORPORATION, ALTA BATES MEDICAL CENTER, AND PATHOLOGY INSTITUTE, INC.

INTEREST OF AMICUS CURIAE[1]

The California Healthcare Association ("CHA") is a nonprofit association whose members consist of hospitals, health systems, physician groups, and other health care providers in California. CHA is one of the largest health care trade associations in the nation with more than 630 hospital, health system, and physician group members, and 175 affiliate and personal members. The purpose of CHA is to provide its members with proactive leadership in health policy development, legislative and regulatory advocacy, and legal representation.

Many members of CHA belong to affiliations of autonomous hospitals that, in some cases, are commonly owned or operated under affiliation relationships. Unless the Ninth Circuit's decision is reviewed and reversed, these members will face the threat of becoming embroiled in the labor disputes of their distant affiliates. This could have a direct and devastating impact on their ability to deliver critical health care services to patients. These members may also face the threat of financial liability for the equal employment and wage and hour violations of their distant affiliates. CHA submits this brief in an effort to protect the vital interests of its members from the effects of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

The Ninth Circuit's unprecedented expansion of the single employer doctrine will have a devastating impact on hospitals and other health care facilities that are autonomous but have relationships with other organizations.

---

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that this brief was authored in whole by counsel for amicus curiae and that no other person or entity, except for amicus curiae, made a monetary contribution to the preparation or submission of the brief.

Among other things, the decision will subject these affiliated hospitals to strikes, picketing, and other forms of economic pressure by unions that have labor disputes with distant affiliates. This result could have potentially catastrophic patient care implications and runs contrary to the Congressional intent behind the 1974 amendments to the National Labor Relations Act. The Ninth Circuit's decision also threatens to make affiliated hospitals financially liable for the equal employment and wage and hour violations of their distant affiliates. For these reasons, the Petition for a Writ of Certiorari should be granted and the decision of the Ninth Circuit reversed.

ARGUMENT

I. Introduction

The single employer doctrine allows the National Labor Relations Board (the "Board") to treat two or more otherwise separate entities as a single employer for purposes of the National Labor Relations Act (the "NLRA" or "Act"), 29 U.S.C. §§ 151, *et seq.*, depending upon the degree of integration among the entities. In determining whether separate entities constitute a single employer, the Board and the courts consider four factors: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership and financial control. *Radio Union v. Broadcast Service*, 380 U.S. 255, 256 (1965). Of these four factors, the centralized control of labor relations is viewed as the most critical. *See, e.g., Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1075 (1st Cir. 1981).

In *Alta Bates Corporation v. NLRB*, 1997 WL 303259 (9th Cir. June 4, 1997), the Ninth Circuit affirmed a decision of the Board which had adopted in its entirety a decision of an Administrative Law Judge ("ALJ") effectively holding that the *mere potential* to exercise common

control over each other's labor relations and operations suffices to make separate entities a single employer. Alta Bates Corporation, Alta Bates Medical Center, and Pathology Institute, Inc., the Petitioners in that case, have filed a Petition for a Writ of Certiorari in this Court (hereinafter "Petition"). The Petition explains that the Ninth Circuit's decision reverses four decades of circuit court and Board authority that had consistently applied the single employer doctrine to require the *actual* exercise of common control over labor relations and operations. (Petition at 8-11.) It also explains that the Ninth Circuit's decision relies on a misinterpretation of precedent and creates a split among the circuits. (Petition at 11-15.) Those arguments are not repeated herein.

Instead, this brief addresses the devastating impact the Ninth Circuit's decision will have on a large segment of health care providers nationwide. As explained below, Alta Bates Medical Center and its affiliates reflect a growing trend in the health care industry toward affiliations of commonly owned but otherwise autonomous hospitals ("affiliated hospitals"). Among other things, the Ninth Circuit's decision threatens to embroil affiliated hospitals in the labor disputes of their distant affiliates, a result that has potentially catastrophic patient care implications and runs contrary to the Congressional intent behind the 1974 amendments to the Act. The decision also threatens to make affiliated hospitals financially liable for the equal employment and wage and hour violations of their distant affiliates. For all of these reasons, the Petition for a Writ of Certiorari should be granted and the decision of the Ninth Circuit reversed.

II. The Growth of Affiliated Hospital Groups

Since the mid-1980's, the health care industry has undergone a dramatic transformation as significant numbers of independent hospitals have combined into hospital net-

works. *See* William M. Stelwagon, *Does a Healthy Patient Need a Cure? A Response to Health Care Industry Proposals to Reform Antitrust Analysis of Horizontal Hospital Mergers*, 69 ST. JOHN'S L. REV. 553, 553-54 (1995). The proliferation of hospital networks has occurred due to a variety of factors, including (1) a need to cut costs and respond to overcapacity in certain health care markets; (2) a desire to capture market share; (3) a shift in federal policy from hospital expansion toward control of heaith care costs; and (4) a desire to take advantage of common contractual relationships with public and private payers. *Id.*; Thomas M. Susman & David A. Martland, *The Brave New World of Health Care: Hospital Mergers and Joint Ventures in the '90s,* 38 BOSTON B.J. 3 (1994) (attributing hospital combinations to "[o]vercapacity, downward pressures on prices, the desire of large buyers to obtain a full array of . . . services from a single provider, and the specter of significant health care reform legislation").

Hospital networks take on a myriad of forms and vary significantly depending upon the degree to which their operations are integrated. *See* Mark A. Hall, *Managed Competition and Integrated Health Care Delivery Systems,* 29 WAKE FOREST L. REV. 1, 8-9 (1994). For example, some tightly-integrated networks own their own hospitals, employ the physicians, have a single board of directors, and market their own insurance. Other more loosely-integrated networks are commonly-owned but autonomously operated. *Id.* These loose affiliations are particularly prevalent among California's nonprofit hospitals due to a state law provision that exempts these types of hospital affiliations from the prohibition on the corporate practice of medicine. *Id.*[2]

---

[2]The corporate practice of medicine provisions in California's Medical Practice Act, Cal. Bus. & Prof. Code §§ 2400, *et seq.*, prohibit most hospitals in California from employing physicians. *Id.* at § 2400. Under

Alta Bates typifies a loosely-integrated hospital network. The Ninth Circuit's decision will have a dramatic impact on all similar networks since, at least under the ALJ's reasoning, they will always have a "potential to control" the labor relations of each other and thus constitute single employers.

III. The Ninth Circuit's Decision Will Have a Devastating Impact on Affiliated Hospital Groups.

A. The Ninth Circuit's Decision Eviscerates the Statutory Protections Against Secondary Boycotts and, Contrary to Clear Congressional Intent, Promotes the Spread of Labor Disputes Among and Between Affiliated Hospitals.

The Petition notes that the Ninth Circuit's expansion of the single employer doctrine effectively nullifies the Act's prohibition on secondary boycotts with respect to commonly owned but otherwise autonomous corporate entities. (Petition at 15-16.) *See* 29 U.S.C. § 158(b)(4). It also notes that the Ninth Circuit's decision will make employers hesitant to hire workers from any commonly owned business. (Petition at 16.)

The impact of the Ninth Circuit's decision will be felt most profoundly in the health care industry as affiliated hospitals will be subjected to strikes, picketing, and other forms of economic pressure by unions that have labor disputes with distant affiliates. In fact, the expansion of the single employer doctrine could allow striking unions to establish picket lines at autonomous facilities throughout a hospital network. Nurses and other employees would have to evaluate whether to honor the picket lines. Any unionized

---

certain circumstances, however, this prohibition does not apply to non-profit institutions and foundations. *Id.*

employees would probably be prohibited from crossing any sanctioned picket line by provisions in collective bargaining agreements and union bylaws to which such employees would be contractually bound. This could cause a potentially catastrophic disruption in patient care throughout an entire hospital network, even if the underlying labor dispute involved a handful of employees at an isolated facility.

This result runs contrary to Congress' intent as expressed in its 1974 amendments to the Act which extended coverage to non-profit hospitals. Pub. L. No. 93-360, 88 Stat. 395 (1974). The dominant theme in the amendments and their legislative history was Congress' intent to minimize strikes and labor disputes in the health care industry and the accompanying disruption of patient care. 1974 U.S. Code Cong. & Adm. News, pp. 3946-60.

> In considering legislation to amend the Act, it was immediately recognized that the health care industry was unique and that disruptions caused by organizational drives and related activities at a hospital were a far more serious concern than at an industrial plant given the grave nature of medical care and the fact that "[hospital] care is not storable."

NLRB v. St. Francis Hosp. of Linwood, 601 F.2d 404, 411 (9th Cir. 1979).

For example, the 1974 amendments require unions to provide 10-days advance notice of any intention to strike or picket a health care institution. 29 U.S.C. § 158(g). Also, the legislative history expressed Congress' intent to limit the ally doctrine as it applies to health care institutions. Under the ally doctrine, the prohibition on secondary boycotts does not apply to employers who perform services that striking employees would have otherwise performed. In particular, Congress noted that health care institutions should not be

subjected to the ally doctrine, and therefore picketing and strikes, simply because they provide life-saving services for patients of a struck health care institution. 1974 U.S. Code Cong. & Adm. News, pp. 3951; *see also N.L.R.B. General Counsel Guidelines: Health Care Institutions*, 4 Lab. L. Rep. (CCH) ¶ 9046 at 15,096-98 (1978).

The Ninth Circuit's decision ignores this legislative history and eviscerates the statutory protections against strikes, picketing, and resultant disruption of patient care. The decision creates a loophole to these legislative mandates by allowing unions to utilize the single employer doctrine as applied by the ALJ to expand labor disputes to distant and loosely affiliated hospitals.

B. The Ninth Circuit's Decision Creates Uncertainty About the Scope and Application of Collective Bargaining Agreements Among Affiliated Hospitals.

The Ninth's Circuit's decision creates uncertainty with respect to the scope and applicability of collective bargaining agreements. For example, many collective bargaining agreements broadly define the bargaining unit in terms of the type of work performed without any site specific or geographical limitations. Unions could argue that such agreements apply to distant affiliates who may have employees performing the same type of work. These arguments could be advanced even though such an expansion of the bargaining unit was never contemplated by the parties to the collective bargaining agreement, much less the distant affiliates. At a minimum, the decision could spawn an unprecedented and unwarranted amount of litigation in the health care industry over the application of collective bargaining agreements between affiliated facilities.

Moreover, unionized health care providers will find it difficult to affiliate with other health care providers or groups of providers because of the uncertainty over the

applicability of the collective bargaining agreements to the nonunion members of the affiliation. Unionized health care providers who find it difficult to join affiliations will be unable to take advantage of the myriad of economic and other benefits available through such affiliations.

C. The Ninth Circuit's Decision Potentially Makes Affiliated Hospitals Liable for the Discrimination and Wage and Hour Claims Against Their Distant Affiliates.

The Ninth Circuit's unprecedented expansion of the single employer doctrine has implications that extend far beyond the Act. Indeed, it will have unintended spillover effects on other federal labor and employment laws, including the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"), the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, *et seq.* ("FLSA"), the Americans with Disabilities Act of 1990, 29 U.S.C. §§ 12101, *et seq.* ("ADA"), the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq.* ("ADEA"), and the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, *et seq.* ("FMLA"). These statutes derive their strength from the cohesiveness of the overall legislative scheme. Consequently, analogous, and in some instances, virtually identical statutory language and judicial interpretations pervade the legislative and judicial structures of these statutes.

The definition of "employer" under the Act has been incorporated, with minor variations, in Title VII, the FLSA, the ADA, the ADEA, and the FMLA. In *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 419, 421 & n.11 (1975), this Court recognized that the framers of Title VII used the Act's provisions as a model and expressly patterned certain sections after the Act. As such, this Court has often relied

on Board decisions to resolve issues under similar provisions of Title VII. [3]

If the Ninth Circuit's sweeping definition of "employer" is left unreviewed, it can be expected that, following the precedents of this Court, lower courts will incorporate this overly-broad definition in resolving similar issues under Title VII and other federal labor and employment laws. In fact, lower federal courts have already used the Board's single employer doctrine, as it was before the inexplicable change, in determining who is an "employer" for purposes of Title VII, the ADEA and the ADA.

Because the NLRA and Title VII use virtually identical language to define the term "employer," lower federal courts have uniformly extended the construction of the NLRA to the civil rights context, and consistently apply the single employer doctrine to Title VII actions.[4] The Board's

---

[3] *See id.* (backpay provision of Title VII expressly patterned after NLRA); *Lorrance v. AT&T Tech., Inc.*, 490 U.S. 900, 909 (1989) (statute of limitations of Title VII and NLRA are construed similarly); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 446-47 & n.26 (1986) (§ 706(g) of Title VII patterned after § 10(c) of the NLRA); *Hishon v. King & Spaulding*, 467 U.S. 69, 76 & n.8 (1984) (construing "term, condition, or privilege of employment" under Title VII with reference to NLRA § 8(d)); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768 (1976) (remedial structures under NLRA and Title VII are similar).

[4] *See, e.g., Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir. 1977) (adopting the NLRB's single employer test); *Lans v. Kiska Constr. Corp.*, 1997 WL 313162 *5 (S.D.N.Y. 1997); *Field v. Corp. Office Systems, Inc.*, 1995 WL 399540 *3, 4 (N.D. Ill. 1995); *Brower-Coad v. Fundamental Brokers, Inc.*, 856 F. Supp. 147, 150, 150 & n.6 (1993) (also noting that decisions of district courts indicate that the NLRB standard governs determinations of single employer status under the Equal Pay Act); *Cruz v. Central States Joint Bd. Health and Welfare Trust Fund*, 1993 WL 259444 *1 (N.D. Ill. 1993); *Schiele v. Charles Vogel Mfg. Co., Inc.*, 787 F. Supp. 1541, 1547-48 (D. Minn. 1992).

single employer doctrine has also been incorporated into the ADA and the ADEA.[5]

For these reasons, if an affiliated hospital is found to be a single employer under the ALJ's new liberal test of mere *potential* control, it will also be found financially liable for the discrimination and wage and hour claims of its distant affiliates. Indeed, the single employer doctrine, recognized as a "back-door means of satisfying [federal discrimination statutes'] numerosity requirement,"[6] is already an expansion of employer liability for discrimination. The unintended result of the ALJ's decision will be an unnecessary and unwarranted expansion of the liability of affiliated hospitals under all other federal employment relations statutes. This result could increase the economic distress of an already financially troubled industry.

---

[5] *See Van Norman v. Harman Mgmt. Corp.*, 1995 WL 803508 *3 (N.D. Cal. 1995).

[6] *Field v. Corporate Office Systems*, 1995 WL 399540 at *3.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD J. SIMMONS
(Counsel of Record)
DOUGLAS R. HART
MICHAEL G. MORGAN
SHEPPARD, MULLIN, RICHTER &
HAMPTON LLP
333 South Hope Street,
48th Floor
Los Angeles, California 90071
(213) 620-1780
Attorneys for California
Healthcare Association